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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 800

DART TRANSIT COMPANY,

Appellant,

vs.

INTERSTATE COMMERCE COMMISSION, UNITED STATES OF AMERICA AND ILLINOIS-MINNESOTA MOTOR CARRIERS CONFERENCE, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

STATEMENT AS TO JURISDICTION

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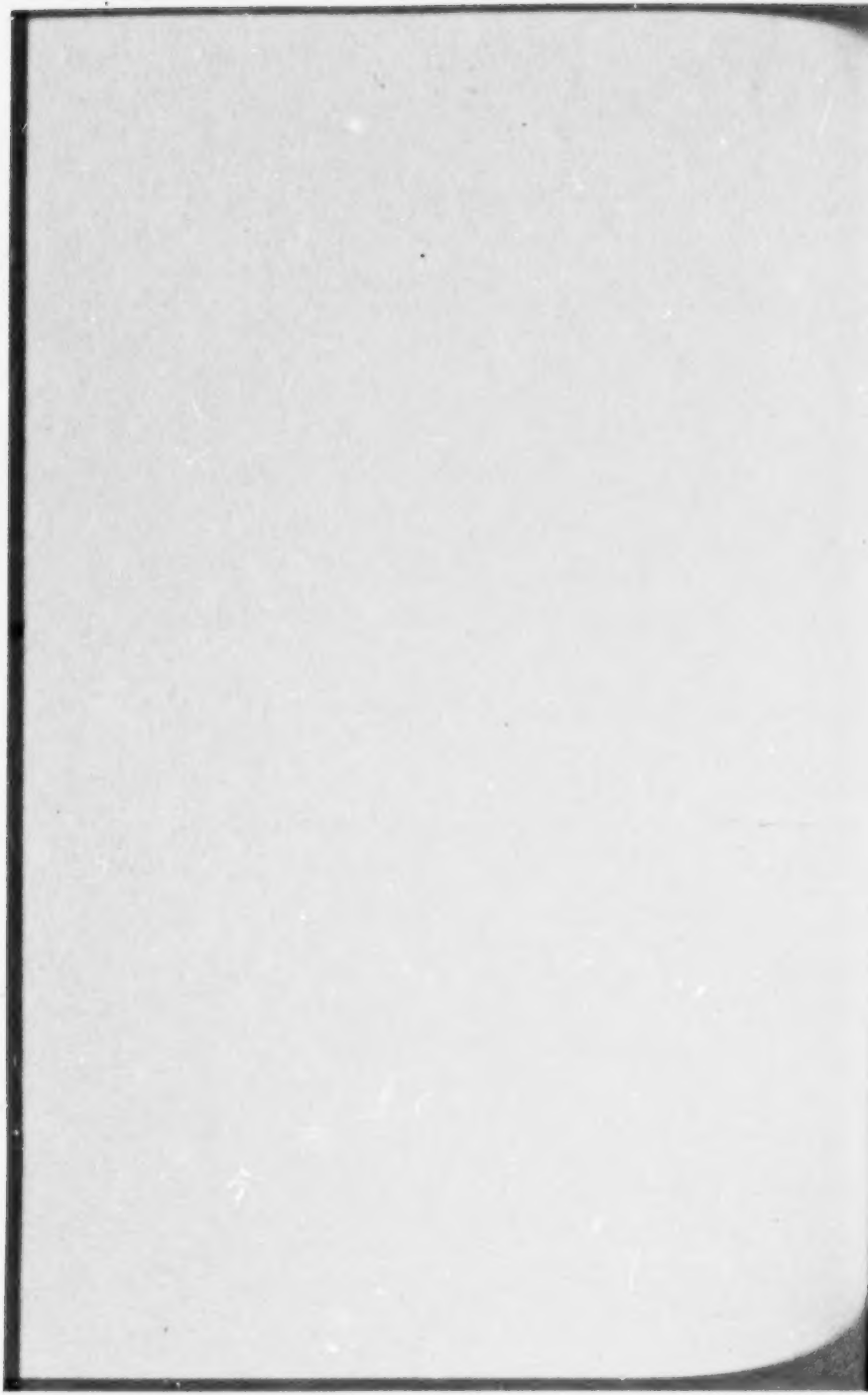

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UNITED STATES DISTRICT COURT OF MINNESOTA,
FOURTH DIVISION

Civil No. 4288

DART TRANSIT COMPANY,
Plaintiff-Appellant,

vs.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA,
Defendants-Appellees,

and

ILLINOIS-MINNESOTA MOTOR CARRIERS' CONFERENCE, INC.,
Intervener-Appellee

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, plaintiff-appellant submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the final order of the district court in this cause denying an injunction against an order of the Interstate Commerce Commission.

Opinion Below

The decision and order of the statutory three-judge court, sitting as the District Court for the District of Minnesota,

Fourth Division, was made and filed on March 20, 1953. The decision has not been reported at the date hereof. A copy of the decision and order for judgment is attached hereto as Appendix A.

Jurisdiction

The decision and order of the district court denying a permanent injunction against and refusing to set aside an order of the Interstate Commerce Commission was entered on March 20, 1953. A petition for appeal is presented to the district court concurrently herewith, that is on April 9th, 1953. The jurisdiction of the Supreme Court to review this decision by direct appeal is expressly conferred by Title 28, United States Code, Sections 1253 and 2101 (b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment and order on direct appeal in this case: *United States* v. *Baltimore & O. R. R.* (1948) 333 US 169; *United States* v. *Hancock Truck Lines* (1945) 324 US 774; *Interstate Commerce Comm.* v. *Hoboken Mfrs. R. R.* (1944) 320 US 368, rehearing denied 321 US 801.

Questions Presented

Appellant has made twelve assignments of error all of which are presented by this appeal. For purposes of brevity, these may be summarized by the following issues:

A. Where the Commission in a proceeding termed by it an "investigation" charges the respondent with violation of law, does it have the burden of proof?

B. If so, did the evidence presented by the Commission satisfy the burden of proof on all issues as to which it made findings and order?

C. Did the Commission give such notice to the plaintiff-appellant as is required by the Administrative Procedure Act?

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D. May the Commission curtail the "grandfather" authority of a motor carrier by an interpretation of the words of the authority which is contrary to the common meaning of ordinary words, which does not lie within any special field of expertise, and which is not based upon any evidence in the record or any specified reference or authority?

E. In the circumstances of this case, were the conduct and rulings of the Hearing Examiner such as to indicate that plaintiff-appellant was accorded due process of law by the Commission?

Statutes Involved

This case involves the following statutes:

Section 209 (1) of part II of the Interstate Commerce Act, 49 Stat. 552, Title 49 U. S. Code, Section 309 (1), which reads, in part as follows:

> "Except as otherwise provided in this section and in section 310a of this title, no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business: Provided, That, subject to section 310 of this Title, if any such carrier or predecessor in interest was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935, * * * the Commission shall issue such permit, without further proceedings, * * * "

Section 204 (c) of part II of the Interstate Commerce Act, 49 Stat. 546, Title 49 U. S. Code, Section 304 (c), which reads, in part, as follows:

> "Upon complaint in writing to the Commission by any person, State board, organization or body politic,

> or upon its own initiative without complaint, the Commission may investigate whether any motor carrier or broker has failed to comply with any provision of this chapter, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. * * * "

Section 212 (a) of part II of the Interstate Commerce Act, 49 Stat. 555, Title 49 U. S. Code, Section 312 (a) which provides that any certificate, permit, or license may be suspended, changed or revoked, in whole or in part, by the Commission, after notice and hearing, if

> "the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 304 (c) of this title, commanding obedience to the provision of this chapter, or to the rule or regulation of the Commission thereunder, or to the term, condition or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder * * * "

Section 5 of the Administrative Procedure Act, 60 Stat. 239, Title 5 U. S. Code, Section 1004, which reads, in part, as follows:

> "In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, * * * (a) Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. * * * "

Section 7 of the Administrative Procedure Act, 60 Stat. 241, Title 5 U. S. Code, Section 1006, which reads, in part, as follows:

> "In hearings which section 1003 or 1004 requires to be conducted pursuant to this section— * * *
>
> (c) Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. * * * "

Statement of the Case

Plaintiff-appellant, Dart Transit Company, hereinafter referred to as Dart, is a contract carrier holding "grandfather authority" under part II of the Interstate Commerce Act to transport packing house and dairy products, equipment, material and supplies; dairy products, equipment, supplies and material; and canned goods and canning factory supplies, between certain specified points and places. Dart's authority was granted by a Commission order dated July 21, 1938 and a formal permit issued February 7, 1942.

In the latter part of 1945 the District Director for the Bureau of Motor Carriers of the Interstate Commerce Commission (herein called the Commission) complained to Dart that it was transporting commodities for shippers other than packing houses and dairies and that this was beyond the scope of its authority. There was some controversy concerning this interpretation between Dart and agents of the Commission, and thereafter, pursuant to the suggestion of the District Director, Dart filed a petition with the Commission for clarification of its authority. On August 26, 1949, the Commission rendered a decision in that proceeding. (49 MCC 607) The Commission held that Dart was not restricted by its authority as to the parties for whom it might haul freight, but indicated that the character of the shipper or consignee might be relevant in determining

whether or not the carriage of particular commodities was within the authority of Dart.

Thereafter, in 1950 the District Director complained to Dart that it was transporting commodities not within the scope of the commodity description of its authority. When Dart refused to agree with the interpretation of its authority made by the District Director, the Commission, on August 4, 1950, issued an order for the investigation of the operations of Dart. The order recited that it appeared that Dart had violated the law and its authority by transporting certain commodities specified therein, that an investigation was instituted under authority of Sections 204 (c) and 212(a) of the Interstate Commerce Act with a view to determining whether Dart was violating its authority and the law and "to issuing such orders and taking such other action as the facts and circumstances may appear to warrant; and upon the failure of Dart Transit Company to comply with any such order, to conduct a further proceeding to determine whether the said permit issued to Dart Transit Company should be suspended or revoked". By subsequent orders, a Hearing Examiner was designated and the hearing was set for November 16, 1950 at St. Paul, Minnesota.

Before formally opening the hearing on the date set, the Examiner announced to the parties that he had another hearing scheduled for the following day at Fargo, North Dakota, and that the Dart hearing would have to conclude in time to permit him to catch the evening train for Fargo.

At the opening of the hearing, counsel for Dart asked to be advised of the matters of fact and law which were asserted by the Commission. The Examiner then replied "That is shown in the order". Dart asked whether it was alleged that it had violated its authority in respect of any commodities not specified in the order. The Examiner's reply was "That will be developed on the record."

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The Commission attorney called as the one and only witness for the Commission a "District Supervisor" of the Commission. This witness offered in evidence two "exhibits" consisting of abstracts taken by him from the records of Dart showing all shipments between certain dates with the names of consignors and consignees. These "exhibits" also contained various comments by the witness which had been typed thereon. Dart objected to the exhibits insofar as they contained comments by the witness not taken from Dart records and insofar as they related to commodities not in issue, but waived objection to the technical foundation and agreed that insofar as the exhibits reflected relevant entries from Dart records they might be received. The Examiner received the exhibits "subject to the objections".

The Commission agent, sitting as its witness, under questioning by the Commission attorney, testified over the objection of Dart that in his opinion a number of the shipments reflected on the exhibits were beyond the scope of Dart's authority. On cross-examination the Examiner severely restricted the right of Dart to inquire into the foundation for the witness' opinions. The record shows that the Examiner sustained not one objection by Dart to the Commission's examination or cross-examination, and overruled not one objection by the Commission to Dart's examination or cross-examination. In other words, Dart was permitted to cross-examine only at the pleasure and sufferance of adversary counsel.

The cross-examination did develop, however, that the opinion of the Commission witness as to Dart's violation of its authority was based largely on the supposed business of the consignees of certain shipments. It further brought out that the witness' knowledge of the business of these consignees was, in most instances, no more than his conjecture from the corporate name. The following excerpt

from the cross-examination is the entire testimony of the witness on the topic mentioned therein and illustrates the quality of the evidence:

> "Q. (Mr. Loevinger) You don't know what the Carr Consolidated Biscuit Company does, do you?
> "A. Other than a biscuit is a biscuit.
> "Q. You don't know anything more about them than their name, do you?
> "A. I do not."

Following the testimony of this Commission witness, Dart presented its evidence. Dart admitted hauling certain sheet metal and "can keys" to a factory which made them into cans. It presented extensive testimony to show that these commodities were earmarked and intended for use in packing houses and dairies at the time of carriage by Dart, and that they were of no use or value, other than as scrap, except as they were used by packing houses or dairies. Dart also admitted hauling canned beer and presented evidence and authority to show that the term "canned goods" as it is used both generally and in the industry properly included this commodity. The Dart testimony took until 7:30 in the evening, and no rebuttal evidence was offered.

On May 8, 1961, the Examiner issued a proposed report. This discussed the evidence in the most general terms and contained as "Conclusions and Findings" only one brief paragraph stating that the commission should find that respondent had operated beyond the scope of its authority and should issue a cease and desist order.

Dart duly filed exceptions to this Proposed Report, renewing its objection to the Commission's failure to specify in any notice the operations alleged to have been beyond Dart's authority and pointing out that at this late stage of the proceedings it was still unable to determine specifically with what violations it was charged.

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Thereafter the Commission issued its Report and Order of May 26, 1952, which are the subject of this case. (54 MCC 429) A petition for reconsideration was duly filed and denied.

The Commission found that Dart had violated its authority by transporting nine classes of commodities. Of these nine groups of commodities, five referred to commodities which were not mentioned in the notice of hearing. Of the remaining four groups of commodities, two related to facts which were undisputed—involving canned beer and sheet metal; and two were based upon the testimony of the Commission witness, which, in turn, rested upon either speculation or remote hearsay.

Thereafter, Dart duly instituted a suit for review of the Commission action by a statutory three judge District Court. Argument and briefs were submitted to the Court, and, on March 20, 1953 the Court filed a decision, concluding that there was a sufficient factual and legal basis for the Commission's challenged order, that Dart was not denied due process of law, and that the preliminary injunction should be vacated and the complaint dismissed. The Court said that it would not substitute its judgment for that of the Commission as to the scope of a permit issued by the Commission. It noted the principle announced by the Supreme Court that the delineation of an enterprise which seeks the protection of the grandfather clause is for the Commission, *Noble* v. *United States*, 319 US 88 (1943), and added that it is also for the Commission to define the scope of the "delineation". It said, ". . . it is of course essential that the Commission be subjected to as little judicial interference as the law will permit." The Court stated that, in its opinion, the evidence offered by the Commission witness as to disputed matters called for explanation by Dart.

The Questions Are Substantial

The questions involved in this appeal involve interpretation of the Administrative Procedure Act and affect the whole field of administrative law. The Supreme Court has not yet made a clear statement as to the burden of proof resting upon an administrative agency in an adjudicatory hearing which is essentially adversary in nature. In the present case, the Examiner and other Commission agents assumed and clearly indicated that because the proceeding was denominated an "investigation", nothing so technical as a burden or proof was involved or need be considered. This was most dramatically shown by the Examiner's suggestion that Dart proceed with its evidence first—presumably to rebut the suspicion raised by the suggestion of violations in the notice of hearing, although no evidence had then been offered by the Commission. The District Court did not address itself explicitly to this issue, although in its suggestion that certain hearsay and conjecture called for "an explanation" it implicitly supported the Commission view that the burden was upon Dart, not upon the Commission.

Appellant believes and submits that the position of the District Court herein is in conflict with the position of the Court of Appeals for the Second Circuit, respecting this issue. The latter court stated what appellant believes to be the correct rule in *United States* v. *Friedl* (CA 2nd 1945) 149 F2d 1011, cert. den. 326 US 756, wherein it said:

> "Indeed, in this day when the legality of so many private transactions is increasingly coming to depend upon their conformity with labyrinths of regulations, it would invert the burden of proof to allow the prosecution merely to call a witness to swear that the accused's conduct had not been in harmony with administrative standards, and to insist that he must explain why it was not."

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The Fifth Circuit Court of Appeals has taken a similar view. *Magnolia Petroleum Co.* v. *National Labor Relations Board*, 5 CCA 1940) 122 F2d 545, wherein it said:

> "In its capacity as accuser, the Board, under the genius of our institutions, is held to the same burdens and obligations of proof as any other litigant who takes the affirmative. It may not by accusing put the accused upon proof. As accuser it must prove its charge."

Appellant believes that the present case is an apt one for announcing to the administrative agencies that Section 7 of the Administrative Procedure Act properly requires them to bear the burden of proving any charges which they make. Appellant respectfully submits that this issue sharply points to some of the dangers which inspired the warning words of Justice Douglas in a dissenting memorandum in *New York* v. *United States*, 342 US 882 (1951), where he says:

> "Unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion. Absolute discretion, like corruption, marks the beginning of the end of liberty."

If the Court puts upon the Commission the same burden of proof as rests upon any other litigant having the affirmative of an issue, then it will be clear that the hearsay and opinion evidence of the Commission's witness fell far short of either satisfying the burden of proof or the test of substantiality laid down by the Court in *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 US 197 (1938), at pages 229-230.

The District Court did consider appellant's contentions as to the adequacy of the notice to it, and held adversely to appellant. However, on this issue appellant takes a posi-

tion based squarely on Section 5 of the Administrative Procedure Act. Appellant specifically directed the attention of the Examiner to this provision of the statute at the opening of the hearing. But all of the cases relied on by the District Court on this issue were decisions rendered prior to and not involving the Administrative Procedure Act. On the other hand, the recent case of *National Labor Relations Board* v. *Kanmak Mills* (CA 3rd 1952) 200 F2d 542 is directly in conflict with the decision herein on this point.

In the *Kanmak Mills case*, the respondents were charged with violation of section 8 (a)(3) of the Labor Act in discharging an employee for union activity. At the hearing, the respondent's manager testified that he offered to reinstate the employee if she would withdraw her charges. Upon the basis of this testimony, at the close of the case the Labor Board attorney moved to amend the complaint to charge a violation of section 8(a)(4) of the Labor Act. The respondent objected, but the Examiner allowed the amendment and found a violation of Section 8(a)(4). The Board upheld the Examiner. The Court of Appeals held that the Board action was erroneous. It said:

> "It is true that the Board and the examiner relied on testimony of respondents' witness, the manager. It is further true that respondents at no time made an offer of specific testimony which they intended to produce to show they were not guilty of conditioning the rehiring of Miss Petrovich on her retraction of charges against them. But those reasons cannot foreclose respondents' right under the Administrative Procedure Act, Section 5(a) (b), 5 USCA §1004, and generally to be given timely notice of the charge and to have an opportunity to contest it. Section 8(a)(4), alleged in the amendment to have been violated by respondents, specifically concerns discharges based on the employees filing charges against the employer with the Board or testifying in Board proceedings. It was entirely new

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> to the Petrovich claim. Respondents were entitled to answer it even though its foundation was the evidence of their own witness which was given in the course of his testimony with reference to the original charge."

The variance between notice and findings in the present case was even greater, for practical purposes, than in the *Kanmak Mills* case. In the latter, the respondent was put on notice that the discharge of a named employee was in issue, and presumably was prepared to present the facts relating to the cause of that discharge. The findings related to the named employee but varied somewhat from the charges contained in the complaint. However, presumably the evidence relevant to the original charge was substantially the same as that relevant to the findings. In the instant case, appellant was notified that it would be required to litigate the issue of the propriety of transporting certain named commodities. Evidence as to a host of other commodities was put in the record. Appellant's demand for a statement from the Commission as to which of these additional commodities were also in issue was rudely rejected. However, the facts and the necessary witnesses and evidence which might have related to commodities not specified in the notice but referred to in the evidence would all have been wholly different and independent from the evidence which appellant was prepared to present on the basis of the notice given to it. Consequently the variance between notice and findings in the present case is much wider than in the *Kanmak Mills* case, and the two decisions are, therefore, in sharp and irreconcilable conflict.

Appellant further submits that the decision of the court below as to the fairness and adequacy of the hearing accorded appellant by the Commission is in conflict with the principles enunciated by the Supreme Court and par-

ticularly with a recent decision of the Ninth Circuit Court of Appeals. The observations of this Court as to the importance of cross-examination are peculiarly applicable where, as here, a proponent's evidentiary case, to the extent that there is one, rests solely on the testimony of one witness. In *Alford* v. *United States*, 282 US 687 (1941), this Court, speaking through Mr. Justice Stone, said:

> "Cross-examination of a witness is a matter of right. . . . It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. . . . To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial." (282 US at 691, 692)

In the *Alford* case the improper denial of cross-examination concerned only the attempt to test general credibility. The principle speaks with even more force in cases such as *Lindsey* v. *United States* (App. D.C. 1942) 133 F. 2d 368, where, as in the case at bar, the undue restriction of cross-examination prevented inquiry into the foundation for the witness's opinions. While the foregoing decisions involve criminal cases, there can be little doubt that the principle is properly applicable, and the Ninth Circuit has recently applied it, to administrative proceedings, such as the one involved here, involving adversary hearings. In *Carter Products Inc.* v. *Federal Trade Commission* (CA 9th 1953) 201 F. 2d 446, as in the instant case, the agency put on a witness who was qualified as an alleged "expert" and permitted to testify as to his opinion on various crucial matters. On cross-examination which

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naturally enough, was directed toward destroying the force of this testimony, the inquiry was sharply curtailed on the ground that it was going beyond the field of the witness's expertise or knowledge. In setting aside the order of the agency, the Court said:

> "Now clearly it is not permissible for the Commission to qualify and use a witness for its own purposes as one having attainments in the field of gastroenterology, and then reduce him for purposes of cross-examination to the stature of a mere taker of X ray pictures."
>
> * * * * * * *
>
> "It is argued that there was ample evidence from other quarters to sustain the findings and order of the Commission, hence the rulings, even if wrong, were not prejudicial. We are of opinion, however, that the cumulative effect of these unjustifiable restrictions on the cross-examination of key witnesses for the Commission was to deprive petitioner of a fair hearing. Such being the case the court is not disposed to speculate as to what would have been the outcome had a fair and impartial hearing been accorded."

Appellant submits that its case on this point, too, is stronger for relief than that in the last decision cited. In the instant case, the Commission had only one witness, its findings largely followed the testimony of this witness, and there was no other possible foundation for the findings than the testimony of the Commission witness. Therefore, the restriction and curtailment of cross-examination of this witness, coupled with the admission into evidence of the opinion and conjecture of the witness when adverse to appellant, inevitably furnished the occasion for the findings against appellant. The rule, therefore, of the *Carter*

Products case would inescapably require that the decision of the District Court in the instant case be reversed.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, FOURTH DIVISION

Civil No. 4288

DART TRANSIT COMPANY, *Plaintiff*,

vs.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA, *Defendants*,

and

ILLINOIS-MINNESOTA MOTOR CARRIERS' CONFERENCE, INC., *Intervenor*

DECISION

Lee Loevinger (Larson, Loevinger, Lindquist, Freeman & Fraser were with him on the brief) for Plaintiff.

C. H. Johns, Assistant Chief Counsel, Interstate Commerce Commission (Edward M. Reidy, Chief Counsel, Interstate Commerce Commission was with him on the brief) for Defendant Interstate Commerce Commission.

Philip L. Roache, Jr., Special Assistant to the Attorney General, and Philip Neville, United States Attorney, (James E. Kilday, Special Assistant to the Attorney General, and Edward P. Hodges, Acting Assistant Attorney General, were with them on the brief) for Defendant United States of America.

David Axelrod (Axelrod, Goodman & Steiner) for Intervenor.

Before SANBORN, Circuit Judge, NORDBYE, Chief District Judge, and BELL, District Judge

SANBORN, *Circuit Judge:*

This action is the outgrowth of a chronic controvery between Dart Transit Company (hereinafter called Dart), a contract carrier by motor vehicle, and the Interstate

Commerce Commission with respect to the commodity coverage of the permit issued by the Commission to Dart. Dart seeks to have set aside the Report and Order of Division 5 of the Commission entered May 26, 1952, in Docket No. MC-C-1185, Dart Transit Company—Investigation of Operations, 54 M.C.C. 429. In that proceeding, the Commission, after a hearing, determined that Dart had transported commodities not authorized by its permit, and entered a cease and desist order. The Commission in its Report summarized its findings as follows (page 440 of 54 M.C.C.):

"We find that respondent (Dart Transit Company), without appropriate authority from this Commission, has engaged in the transportation in interstate or foreign commerce, (1) of tin plate, wire can keys and solder; (2) of shelled Spanish peanuts; (3) of beer in cans, bottles, and kegs; (4) of frozen foods; (5) of meat and packing-house products from Faribault, Minn.; (6) of cleansers, and (7) of empty glass bottles, jars, empty paper containers, paper products, and wooden boxes, in the manner and to the extent set forth above.

"An order will be entered requiring respondent to cease and desist and hereafter to abstain from all operations in interstate or foreign commerce of the character found in this report to be unlawful."

Dart asserts that the order of the Commission is invalid because the Commission failed adequately to notify Dart of the issues to be considered at the hearing, denied Dart a full and fair hearing, and made findings which were not warranted by the evidence or the law.

Most of the evidentiary facts are not in dispute. Dart had acquired from a predecessor "grandfather" rights, under § 209(a) of Part II of the Interstate Commerce Act, 49 U.S.C.A. § 309(a), to transport, as a contract carrier over irregular routes, certain commodities between specified points. The Commission on February 7, 1942, issued to Dart a permit which described the commodities that Dart was authorized to transport, as follows: (1) "Packing house and dairy products, equipment, material, and sup-

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plies"; (2) "Dairy products, equipment, supplies, and material"; (3) "Canned goods and canning factory supplies."

Dart, as shown by its own records, which were introduced in evidence, had transported shipments which the Commission ruled were of a character excluded from the coverage of Dart's permit.

The Commission in August, 1949, had considered a petition of Dart in Docket No. MC-77055 for a clarification or modification of its permit. Dart Transit Company—Modification of Permit, 49 M. C. C. 607. In that petition Dart sought unrestricted authority to transport general commodities to and from all points specified in its permit. The Commission ruled that Dart did not have, and was not entitled to have, authority for the unrestricted transportation of general commodities (pages 609-610 of 49 M.C.C.), but that that did not mean that under Dart's permit it was limited with respect to the type of persons for whom it might transport the commodities specified in its permit. The Commission said with respect to the commodity description of the permit (page 611 of 49 M.C.C.):

"* * * A particular item as, for example, sawdust or cotton duck when moving to a packing house or dairy is readily classified as a packing house or dairy supply, but the same commodity may also be used by others in wholly different businesses. Obviously, sawdust is not a packing-house supply when consigned for example, to a briquet manufacturer or fuel dealer nor would cotton duck be a packing house supply when moving to a tent or awning manufacturer. In order for sawdust or cotton duck to be a packing-house or dairy material or supply, they must be earmarked or intended at the time for use in a packing house or dairy. Thus, almost without exception packing-house supplies, et cetera, would move only to or from packing houses or to or from dealers in packing house supplies, et cetera, and any movement of a commodity which might be a packing-house commodity, to or from any other type of shipper would normally appear to be outside petitioner's authority in the absence of special or unusual circumstances."

The Commission's construction of the authority of Dart, in Docket No. MC-77055, was not acceptable to, nor accepted by, Dart.

On April 27, 1950, the District Director of the Bureau of Motor Carriers of the Interstate Commerce Commission, at its Minneapolis office, wrote a letter to Dart stating, among other things, that Dart was misinterpreting its operating authority and that it could not continue to transport commodities of the character included in some shipments which it had theretofore carried. The Director specified seven types of commodities which he asserted were beyond Dart's authority to transport.

Counsel for Dart on May 15, 1950, replied at length to the letter of the Director. In this reply counsel referred specifically to, and discussed in detail, each of the seven types of shipment which the Director had challenged, namely: (1) shipments of tin plate from Gary, Indiana, to the American Can Company (a manufacturer of cans) in St. Paul, Minnesota; (2) shipments of boxes, cartons, etc., for Waldorf Paper Products Company; (3) shipments of canned and bottled beer for the Hamm Brewing Company; (4) shipments of glass bottles for the Toni Company; (5) shipments of cleanser for the Royal Lemon Company in Minneapolis; (6) shipments of frozen eggs in cans; (7) shipments of cases or cartons from Flour City Box Company to Pepsi Cola Bottling Company.

In his letter counsel for Dart stated that it claimed the right to transport, and would continue to transport, the classes of commodities referred to, "unless and until it is prevented from doing so by legal action." The last paragraph of counsel's letter of May 15, 1950, to the Director reads as follows:

"However, compliance with your letter of April 27 would involve such a substantial loss of business for Dart that it is doubtful it could continue to remain in business. Since it has already at your insistence filed one petition for interpretation of its permit with the Commission, and since the decision of that matter took more than two years and apparently did not result in any substantial clarification so far as the permit was concerned, Dart does not feel that

there is anything to be gained by further application to the Commission for additional interpretation. It is therefore suggested that on the basis of the admissions made in this letter, which will be stipulated to by Dart, you or the appropriate representative of the Commission take such legal action as will raise the issue of the propriety of Dart operations so that we may within a reasonably short time have some relatively final determination of the scope of Dart's authority."

Apparently Division 5 of the Interstate Commerce Commission accepted the suggestion of Dart's counsel, for, by an order of August 4, 1950, an investigation into Dart's operations was instituted. The order charged Dart with transporting "various commodities not within the scope of the commodity description * * *; including beer, in cans, in bottles, and in kegs; empty glass bottles for use in distributing soft drinks, beer, hair waving solutions, and shampoos; tin plate and sheet metal to a can manufacturer for use in manufacturing cans; paper containers and other paper products for use by manufacturers of or dealers in electric batteries, paints, beer, dry cleaning supplies, flour, soap, and petroleum products; and paper garment hangers."

The hearing before the Examiner designated by the Commission lasted a full day. Counsel for the Bureau of Motor Carriers introduced its evidence in the morning, and counsel for Dart had the afternoon and early evening to put in its case. Several interveners appeared, but took only a minor part in the proceeding. The examiner, during the hearing, sought to prevent waste of time in the examination and cross-examination of witnesses with respect to their opinions or conclusions relating to issues which the Commission was capable of deciding and would ultimately have to decide. The Examiner, over the objection of Dart, refused to confine the evidence to shipments of commodities of the kinds specifically mentioned in the Commission's order instituting the investigation.

It is apparent that Dart is in no position to complain of any lack of notice. See and compare, New York Central and H. R. R. Co. v. Interstate Commerce Commission (C.C.

S.D. N.Y.), 168 F. 131, 138-139; National Labor Relations Board v. Piqua Munising Wood Products Co., 6 Cir., 109 F. 2d 552, 557; Mansfield Journal Co. v. Federal Communications Commission (C.A. D.C.), 180 F.2d 28, 36; Cincinnati, Hamilton & Dayton Railway Co. v. Interstate Commerce Commission, 206 U. S. 142, 149-150; Chicago, St. Paul, Minneapolis & Omaha Railway Co. v. United States, 322 U. S. 1, 3-4.

It is not enough to invalidate a hearing that the notice given to a litigant, who was already aware of the issues to be tried, did not contain a complete and precise bill of particulars.

We find nothing in the record which indicates to us that the hearing accorded Dart was not a full and fair hearing. Counsel for Dart called its witnesses, put in its evidence, and rested the case before the Examiner without requesting additional time or a further hearing. Counsel stated that he would like to file a brief, and was granted leave by the Examiner to do so. Counsel also stated that Dart would like to have the Examiner issue a proposed report. That was also agreed to. There is no adequate basis in the record for a ruling that Dart was denied due process in the proceedings before the Commission. See United States v. Pierce Auto Freight Lines, Inc., 327 U.S. 515, 529-530.

The Commission reached the conclusion (1) that shipments of tin plate, solder, and wire can keys delivered to a can manufacturer were not within the coverage of Dart's permit, even though the manufacturer used the materials for the making of cans for packing houses or canneries; (2) that shipments of shelled Spanish peanuts (which Dart's records showed it had transported, but which its president denied that it had transported) were unauthorized; (3) that the transportation of beer in cans, bottles and kegs was not within the scope of Dart's authority, since the term "canned goods" as used by the Commission did not include canned beer or other materials which merely for convenient packaging were put in cans, and since carriers serving breweries were customarily authorized to transport "malt beverages," while those serving canneries

were authorized to transport "canned goods"; (4) that Dart had exceeded its authority in transporting certain glass bottles and jars for uses foreign to packing houses, dairies or canneries; (5) that frozen foods were not "canned goods" within the meaning of Dart's permit; (6) that loose meats and packing-house products shipped from a meat packer in Faribault, Minnesota, to itself in Chicago were not within the scope of Dart's permit; (7) that Dart exceeded its authority in transporting paper containers, paper products, cleanser, wooden boxes, and glass trays to or for persons not engaged in the packing house, dairy products, or canning business, it appearing that such commodities were not products of or intended for use in a packing house, dairy or cannery, and that, in order for Dart to stay within the scope of its authority, "such commodities must at the time of shipment definitely be intended for use by a packing house, dairy-products concern, or cannery."

It should be said that by a permit dated March 26, 1952, Dart was authorized by the Commission to transport glass containers and caps, covers and tops therefor, from Alton and Streator, Illinois, to all points in Minnesota. That authority is, however, not impaired or affected by the order of the Commission involved in the instant action.

It is our opinion that in an action such as this, a court may not substitute its judgment for that of the Commission with respect to the question of the scope or coverage of a permit which the Commission has issued to a motor carrier, if that question is at all doubtful. In Noble v. United States, 319 U.S. 88, 93, the Supreme Court said that "The precise delineation of an enterprise which seeks the protection of the 'grandfather' clause has been reserved for the Commission." By the same token, we think that within reasonable limits it is for the Commission to determine the scope of the "delineation." The meaning of words may be a question of law or a question of fact. This was made plain in Great Northern Railway Co. v. United States, 259 U.S. 285, 291-296. See, also, Standard Oil Co. v. United States, 283 U. S. 235, 238-240. Words may have one meaning when used in industry or in the regulation of industry and

another meaning when used in common speech. We are not convinced that in the interpretation of Dart's permit the Commission misapplied the law or exceeded its jurisdiction. For instance, we are not prepared to say that as a matter of law the term "canned goods" as used in Dart's permit covered "canned beer" or every sort of canned materials. In the interest of uniformity in the regulation and policing of the motor carrier industry, it is of course essential that the Commission be subjected to as little judicial interference as the law will permit.

Some of the findings of the Commission in the instant case were, in our opinion, clearly right. We are not convinced that any finding of the Commission was clearly wrong. We think the inferences the Commission drew from the evidence were permissible. The evidence relative to Dart's shipments of commodities to or for corporations which were apparently not in any way engaged in the packing-house, dairy or canning industries was, we think, sufficiently persuasive to call for an explanation from Dart. For instance, one reasonably may believe that a "Biscuit Company" is not a packing-house, dairy or canning industry. In the absence of any explanation indicating that these questioned shipments were of commodities covered by Dart's permit, the Commission was, we think, warranted in inferring that Dart had exceeded its authority with respect to the transportation of such shipments.

But if it be assumed that some of the findings of the Commission were based upon a wrongful inference as to the nature of the business of a shipper for whom or to whom goods were transported, we would still be of the opinion that the order of the Commission directing Dart to abstain from transporting commodities not authorized by its permit as construed by the Commission was a valid order.

We conclude that there was a sufficient factual and legal basis for the Commission's challenged order, that Dart was not denied due process of law in the proceedings before the Commission, and that the preliminary injunction heretofore entered in this action should be vacated and the complaint dismissed.

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Judgment may be entered accordingly.
Dated at Minneapolis, Minnesota, March 20, 1953.

JOHN B. SANBORN,
United States Circuit Judge.
GUNNAR H. NORDBYE,
United States District Judge.

Robert C. Bell, United States District Judge, who is temporarily absent from the District of Minnesota, has by mail advised the court of his concurrence in this decision.

UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, FOURTH DIVISION

Civil No. 4288

DART TRANSIT COMPANY, *Plaintiff,*

vs.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA, *Defendants,*

and

ILLINOIS-MINNESOTA MOTOR CARRIERS' CONFERENCE, INC., *Intervener.*

CONCURRENCE IN DECISION

The undersigned judge of said Court, having been and acted as a member of a duly constituted three-judge statutory court in the above entitled case, and having heard the arguments therein and received copies of the briefs, having duly considered the matter and participated in the determination thereof, and having concurred in the decision and order of the Court made and entered March 20, 1953, but having been absent from the State of Minnesota at the time said decision was filed and consequently not hav-

ing physically signed the decision, does hereby formally declare and indicate his participation in the determination of and concurrence in the decision and order of the Court herein dated and entered March 20, 1953; and

It Is Ordered, that this concurrence shall be filed with and be a part of said Decision and Order.

Dated April 6, 1953

(Signed) ROBERT C. BELL,
United States District Judge.

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FILED
MAY 14 1953
HAROLD B. WILLEY, Clerk

In the Supreme Court of the United States

No. 800

OCTOBER TERM, 1953

DART TRANSIT COMPANY,
Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants-Appellees,

and

ILLINOIS-MINNESOTA MOTOR CARRIERS CONFERENCE, INC., Intervener-Appellee.

BRIEF OPPOSING MOTION TO AFFIRM

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In the
Supreme Court of the United States

No. ————

OCTOBER TERM, 1953

DART TRANSIT COMPANY,
Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants-Appellees,

and

ILLINOIS-MINNESOTA MOTOR CARRIERS CONFERENCE, INC., Intervener-Appellee.

BRIEF OPPOSING MOTION TO AFFIRM

This matter comes before the Court on direct appeal from the final judgment of a three-judge district court refusing to set aside certain findings and an order of the Interstate Commerce Commission directed against appellant. The appeal was allowed on April 9, 1953, and appeal papers were thereafter duly served on the other parties. A detailed account of the facts appears in the Statement as to Jurisdiction. On April 27, 1943, the appellees' Motion to Affirm was served on appellant.

The gist of the argument supporting the motion to affirm is that the questions raised by appellant are not substantial and do not merit even the serious consideration of the Court. The motion to affirm and the argument in its support appear plausible enough and, upon their face, appear successfully to minimize the importance of the issues raised by appellant. It is appellant's conviction, however, that the arguments of appellees will not stand careful analysis, and that the issues—whatever may be the final determination made of them—are substantial and merit careful consideration.

First, as to the burden of proof. Appellant asserts that the Commission neither recognized nor assumed the burden of proof as to the charges which it brought, and on which it made findings, against appellant. The government does not discuss this issue generally in its motion, but confines its discussion to one illustration cited in appellant's jurisdictional statement. In that illustration, appellant demonstrated that a finding of the Commission on one point rested on the testimony of its investigator that appellant had made shipments to a consignee named "Carr Consolidated Biscuit Company." The testimony was that the witness knew nothing of the business of the consignee, but inferred solely from the corporate name that it was a "biscuit company." The government now comes and argues (page 8 of its typewritten motion):

> "We submit that it was not unreasonable to *presume* that the business of a biscuit company relates to biscuits. Certainly the *presumption* was strong enough to shift to appellant the burden of rebutting it." (Emphasis added.)

Thus what was previously merely an inference, becomes, in the argument of counsel, a presumption. In accordance with well-recognized principles of law, a presumption

takes the place of proof and puts the burden of going forward on the other party. Consequently, by simply using the right words the government altogether avoids the burden of proof which is properly upon it and shifts the burden to appellant. That is exactly what appellant is seeking to have this Court correct. That is what the courts that have considered other similar cases recently have held cannot be done. See *Rubin Bros. Footwear, Inc. v. National Labor Relations Bd.* (CA 5th) (decided April 13, 1953) 31 LRRM 2614, and cases cited in jurisdictional statement.

In fact, no substantial evidence, or indeed any evidence at all, has been offered against appellant on this point. The government is simply seeking to substitute words for facts. All that has been offered is that appellant hauled freight to a company with a corporate name including the word "biscuit." Assuming, arguendo, that this is enough to justify an inference (although surely not a *presumption*) that the company is engaged in the manufacture, or distribution, or sales, or something, of biscuits, it surely does NOT justify any inference that the corporation is NOT engaged in any other business or activities. The diversification of American industry is too well known to permit any such inference. The reports of the decisions of this Court alone show the fact. Simply taking decisions at random from the last term, the "Standard Oil Company" is engaged, inter alia, in operating river boats and barges, *Standard Oil Co. v. Peck*, 342 U. S. 382, the "Ruberoid Company" manufactures asphalt and asbestos (not rubber) roofing materials, *Federal Trade Comm'n v. Ruberoid Co.* 343 U. S. 470, and "Youngstown Sheet and Tube Company" operates a steel mill (whether it makes sheets or tubes is not disclosed). *Youngstown Sheet and Tube Co. v. Sawyer*,

343 U. S. 579. A glance through any popular publication will give a dozen other similar or more striking examples. "General Mills" makes electric irons; "Hotpoint" makes refrigerators; "General Motors" makes oil burners, refrigerators and numerous other things besides "motors"; duPont (a "gunpowder company") makes nylon and almost everything else anyone can think of; meat packing companies produce pharmaceuticals; distillers manufacture antibiotics; and the list could be extended endlessly.

If the principle contended for here by the government were adopted it would not only do violence to all principles of logic and legal procedure, but would create endless mischief in the administration of the law. Adoption of a name importing some charitable purpose—such as "benevolent" or "protective"—would create a *presumption* of tax exempt status. Use of a name with a local geographical significance would create a *presumption* against federal jurisdiction based on doing business in interstate commerce. Ridiculous as these suggestions are, they appear no more ridiculous than the suggestion of the government that the mere fact that appellant hauled freight to a so-called "biscuit company" creates a presumption, which appellant is bound to rebut, that the freight hauled did not relate to dairy or packing house products but rather related to some vague category of "biscuit" products.

The government, in its motion, cites a "*Directory of U. S. Companies*" which is alleged to describe the business of the Carr Consolidated Biscuit Company as "biscuits, crackers, cookies." It is not clear what significance this is supposed to have. The most that could be argued from it is that it does support the inference that Carr is engaged in doing something to biscuits, etc. It surely

furnishes no grounds for the negative inference discussed above. However, there is an even more important objection to this. The citation of this "Directory" (which is unknown to appellant) is the very first mention of it, or of any similar source, made in this proceeding. If it is meant to suggest that the Commission took judicial notice of this "Directory", then surely it must be conceded that appellant was entitled to be informed of the source which the Commission proposed to or did resort to as the basis for its findings. Certainly it cannot be contended that the Commission can privately resort to some publications which are, so far as appellant is concerned, secret and undisclosed and can make findings on the basis of reports never disclosed to appellant, in such a proceeding as this. On the other hand, if it is meant merely to suggest that the Commission might have, but did not, utilize such a "Directory" then the answer is that this is wholly irrelevant. It is too late for the government—as it is too late for the appellant—to offer fresh evidence for the consideration of the Court at this stage of the proceedings. Appellant does not know what the alleged "Directory" states, or what sources it is compiled from, or what the data included is intended to indicate. But appellant does not believe that it is appropriate to undertake such an inquiry at this stage of the proceedings. The findings of the Commission are supposed to be based upon evidence which is offered at such a time and in such a manner that it can be examined and analyzed by the parties, that witnesses can be cross-examined, and that rebutting or explanatory evidence may be offered. Certainly this is not the situation with reference to the casual citation of an item from some "Directory" in a motion to dismiss. The fact that appellees feel it either necessary or appropriate to

cite material which is obviously dehors the record is a clear indication that the record itself does not support the inference which the Commission sought to draw from it. The appellees' attempt to invent a verbal formula which will shift the burden of proof to the appellant suggests the difficulty that appellees must have in contending that the Commission either recognized or sustained the burden of proof. To seek to minimize this issue is not merely to take advantage of a small and relatively unimportant trucking company; it is to turn one's back on the lesson of ten centuries of legal history.

Second, as to the nature of the notice to appellant. Appellees assert that appellant is in no position to complain of lack of notice because the nature of its controversy with the Commission was well known to it, because it did not seek a continuance, and because its demand for specification of the issues was not made until the day of the hearing. Again it must be conceded that these are plausible sounding arguments which would, if justified, fully meet any complaint about lack of specificity in pleading in the ordinary case. But this is not the usual case, and these arguments are quite beside the point.

Appellant is not here complaining about lack of particularity or specificity in the pleading. The notice of hearing given to it was specific enough to meet all legal tests. The difficulty was that the Commission did not confine the proceedings to the specified issues and did not give appellant any notice of its intention to depart from the specified issues. Thus the notice said that a hearing would be held on issues A, B and C. Appellant, to protect its record, specifically asked the Commission if any other issues were involved in the case. The Com-

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mission, through its Examiner told appellant, in substance "It's none of your business. Be quiet. Sit down and listen." At the time of issuance of the Examiner's report appellant had a suspicion, but still no definite knowledge, that the Commission was broadening the issues. Not until the issuance of the Commission's report did appellant know that the Commission was making findings not only as to issues A, B and C, but also as to issues D, E and F. A petition for rehearing filed thereafter, specifying this variance as one of the grounds, was denied. When and how should appellant have asked for a continuance? Should appellant have assumed that the refusal of the Commission to specify the issues at the hearing indicated an intention to disregard the constitutional and statutory principles upon which appellant seeks to rely? It is respectfully submitted that no such assumption is practical, warranted or required. To try a case on the assumption that the trial tribunal in rendering its decision will disregard applicable legal principles would be not only discourteous in the extreme, but also utterly impractical and probably unprofessional.

It is quite true that appellant had a long standing controversy with the Commission representatives over the interpretation of appellant's authority. However, this had ranged over the whole field of operations of appellant. At different times it had involved different phases of appellant's operations. The position of the Commission representatives had shifted from time to time. Appellant could not and did not assume that every phase of its long standing controversy would be investigated in this hearing—since the notice of hearing specified particular issues, and since the time for hearing was limited to a very short period.

The fact is that at the time of receiving the notice of hearing and for some time thereafter appellant (and its counsel) assumed that the hearing would be concerned with the issues specified in the notice. In some conversations between appellant's counsel and the Commission counsel shortly before the hearing (which are referred to in the record) appellant first had its suspicion aroused that the Commission agents might not confine the hearing to the issues specified in the notice and which appellant was prepared to try. Accordingly at the very opening of the hearing appellant demanded to know—as it had a right to know under the Administrative Procedure Act—whether any issues were to be tried which were not specified in the notice previously given to it. The Examiner brusquely refused to comment, and no indication whatsoever was given to appellant as to whether or not the Commission considered the "investigation" to be authorized to consider appellant's whole range of operations or to be confined to the matters specified in the notice of hearing.

Thus in the circumstances of this case, the reply of the government to appellant's objection is irrelevant. Appellant's previous communications with Commission agents did not indicate a particular point or points of controversy, but, on the contrary, indicated merely that there was a wide divergence in the views of appellant and the Commission's agents. Thus appellant did, as soon as it had any reason to think that there was an occasion for it, demand to know what the issues, if any, were other than those specified in the notice to it. But it is crucial to keep in mind that appellant was *not* demanding a "bill of particulars" or a "more definite statement" in the usual sense. The notice was sufficiently particular and definite *if it correctly stated the issues*. But if it did

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not correctly state the issues, then the notice was no more than a trap for appellant. It invited appellant to litigate issues A, B and C, but thereafter the Commission made findings as to issues D, E and F. Thus it not only trapped appellant into failing to prepare or litigate issues which the Commission later made findings on, but it also deprived appellant of any opportunity to do what the government now contends appellant should have done—move for a continuance or adjournment.

To reduce the argument to specific terms, the Court is invited to compare the specifications in the notice of hearing (set forth on page 3 of the typewritten motion to dismiss) with the findings of the Commission, as sustained and summarized by the district court (set forth on page 4 of the typewritten motion to dismiss). The issues involve the alleged transportation by appellant of commodities which were outside the scope of its authority. Each commodity is a separate issue, involving distinct and discrete facts and requiring separate investigation and individual witnesses. These issues as stated in the notice of hearing and in the findings are:

NOTICE OF HEARING	FINDINGS AND DECISION
beer in cans, bottles and kegs	beer in cans, bottles and kegs (3)
empty glass bottles for use . . .	glass bottles and jars (4)
tin plate and sheet metal	tin plate, solder & wire, can keys (1)
paper containers . . .	paper containers . . . (7)
other paper products	paper products (7)
paper garment hangers	
	shelled Spanish peanuts (2)
	frozen foods (5)
	loose meats and packing house products from Faribault, Minn. (6)
	cleanser (7)
	wooden boxes (7)
	glass trays (7)

It must be kept in mind that appellant does not complain of lack of notice generally, but only of lack of notice as to findings made by the Commission which were completely outside the scope of any issues tendered to

appellant as involved in the hearing prior to the Commission's decision. When this is understood, it may be seen that the argument made in the motion to dismiss is quite irrelevant to appellant's contention here.

Third as to the limitation on cross examination. This is the kind of issue that it is difficult, or impossible, easily to epitomize. Indeed, it is doubtful if the printed record ever fully conveys the atmosphere and circumstances of a contested trial sufficiently to indicate with accuracy and certainty the nature of such error. However, it is certain that nothing less than the full record will serve to show such error. It is completely contrary to the fact to assert that the examiner's purpose, either expressed or subjective, in limiting the examination was to avoid repetitious and argumentative matters. Appellant does not like to verge on the disrespectful, but it would be closer to the fact to suggest that the examiner's purpose was to prevent appellant from weakening the force of the Commission's testimony. In any event, whatever the purpose of the examiner, the fact stands stark and clear in the record that he did not sustain one single objection by appellant and he did not overrule one single objection by the Commission counsel. Appellant in its presentation of testimony sought to follow the ordinary rules of evidence and did not offer opinion, speculation or conjecture. Nevertheless the examiner curtailed appellant's presentation more than two dozen times on his *own motion*, and other times on the objection of counsel. On the other hand, the Commission counsel offered testimony which was almost nothing but hearsay, conjecture and opinion. But the examiner did not once curtail the Commission counsel in his examination or cross-examination. It is simply absurd to suggest that all of these rulings were to avoid repetition or argument. The au-

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thorities cited in appellant's jurisdictional statement clearly show that the limitations put upon appellant's examination by the examiner are prejudicial error.

Finally, as to the substantive issues, appellant has no quarrel with the general principles stated in the motion to affirm. Appellant does contend that the Commission's interpretation of the term "canned goods" is clearly unreasonable, contrary to the uncontroverted evidence in the record, and is not based upon any expert knowledge or specialized insight that the Commission might have acquired because of its experience with transportation regulation.

The motion to affirm gets slightly confused on this issue, as indeed the Commission has been throughout its controversy with appellant. The government now argues that intended use is a proper test for determining the classification of freight for this purpose. But appellant is prepared to show that this test is used by the Commission here only when it results in a finding against appellant. When appellant demonstrates that the intended use of goods is by the packing or dairy industries then the Commission resorts to some other test. Furthermore, this test has nothing to do with the question of whether or not "canned goods" includes canned beer. On this latter point appellant offered a large amount of testimony and evidence. The Commission offered literally no evidence whatsoever. In its decision the Commission conceded that canned beer is "technically" canned goods, but nevertheless held that appellant had violated its authority by transporting canned beer under its canned goods authority. Appellant respectfully submits that it is unreasonable and improper to find one guilty of violating a law for doing what one "technically" has the right to do. At the very least,

this most assuredly raises an issue substantial enough to entitle one to a plenary hearing before the Court.

Respectfully submitted,

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338 Midland Bank Building,
Minneapolis, Minnesota,
Counsel for Plaintiff-Appellant.

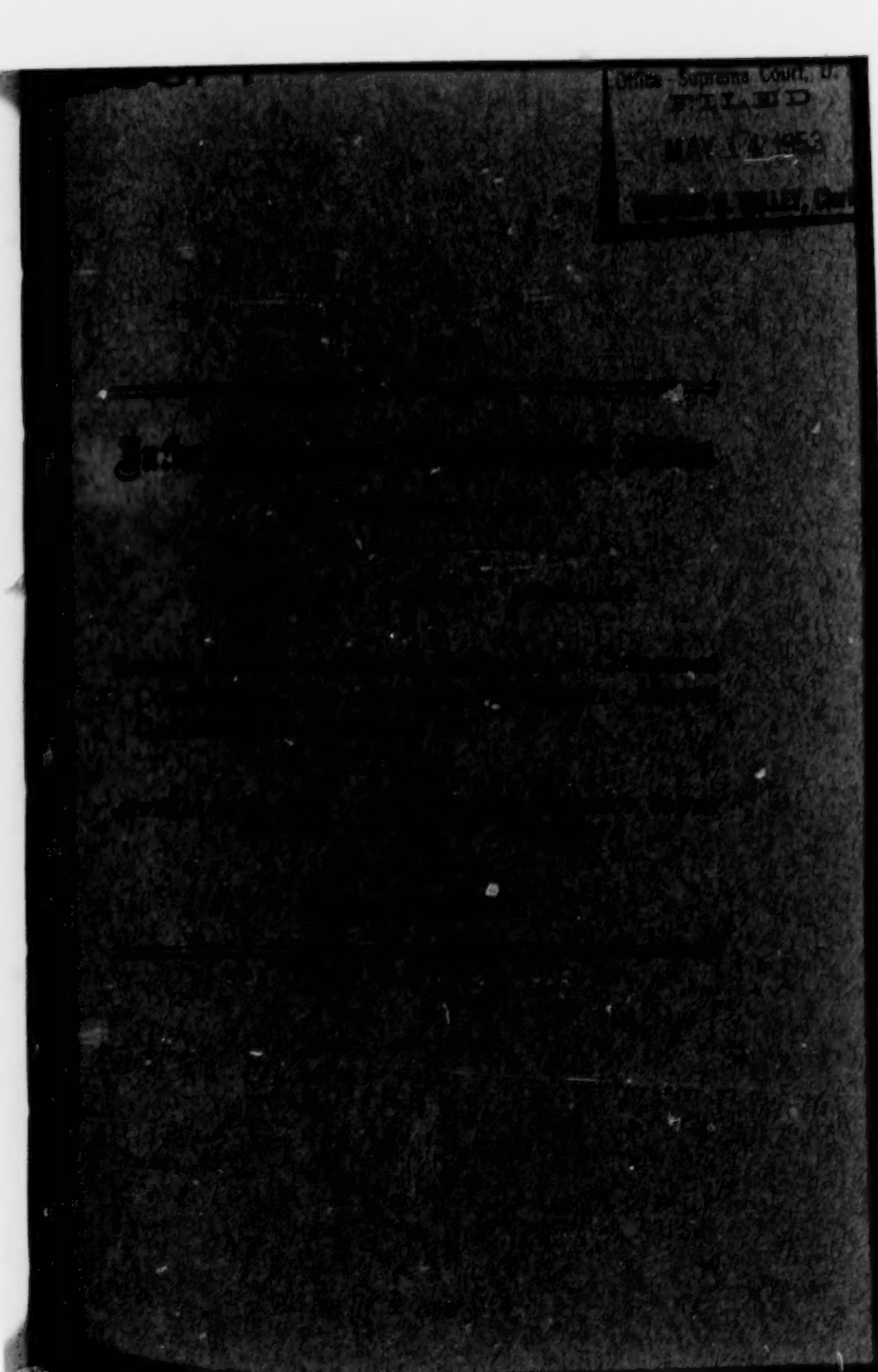
OF COUNSEL:
David W. Louisell,
Larson, Loevinger, Lindquist, Freeman & Fraser,
Minneapolis, Minnesota.

CERTIFICATE OF SERVICE

I certify that I have caused copies of the above and foregoing Brief Opposing Motion to Affirm to be mailed this date to Robert L. Stern, Acting Solicitor General, Justice Department, Washington, D. C., Edward M. Reidy, Chief Counsel, Interstate Commerce Commission, Washington, D. C., counsel for appellees, and David Axelrod, Esq., 39 South LaSalle Street, Chicago, Illinois, counsel for intervener.

Dated: May ——, 1953.

LEE LOEVINGER.


Office - Supreme Court, U.
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In the United States District Court for the District of Minnesota, Fourth Division

CIVIL NO. 4288

DART TRANSIT COMPANY, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANT-APPELLEES

AND

ILLINOIS-MINNESOTA MOTOR CARRIERS' CONFERENCE, INC., INTERVENER-APPELLEE

MOTION TO AFFIRM

Pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, appellees United States and Interstate Commerce Commission move that the final judgment of the district court entered on March 20, 1953, be affirmed.

This is a direct appeal from the final judgment of a specially-constituted three-judge district court, convened pursuant to 28 U. S. C. 2284. The court dismissed appellant's complaint which sought to set aside a cease and desist order entered by the Commission on May 26, 1952. Appeal was allowed on April 9, 1953, and appeal papers were served on April 13, 1953.

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The essential facts are summarized in the report of the Commission (54 M. C. C. 429) and in the detailed opinion of the district court, a copy of which is appended to appellant's statement as to jurisdiction. We shall state them here in brief.

Appellant has authority as a contract carrier to transport certain commodities over irregular routes between specified points. Its permit, issued in 1942, contains the following commodity descriptions: (1) "Packing house and dairy products, equipment, materials, and supplies"; (2) "Dairy products, equipment, supplies, and materials"; (3) "Canned goods and canning factory supplies."

The first instance in which the Commission had occasion to construe appellant's authority was in 1949 when appellant petitioned for a clarification or modification of its permit. See *Dart Transit Company—Modification of Permit*, 49 M. C. C. 607. In addition to denying appellant's request, made in that proceeding, for authority to transport general commodities, the Commission set forth the criteria which should be employed in determining whether a particular commodity shipment should be deemed a packinghouse or dairy supply. It stated in this connection (49 M. C. C. at 611):

> * * * A particular item as, for example, sawdust or cotton duck when moving to a packinghouse or dairy is readily classified as a packinghouse or dairy supply, but the same commodity may also be used by others in wholly different businesses. Obviously, sawdust is not a packinghouse supply when con-

> signed, for example, to a briquet manufacturer or fuel dealer, nor would cotton duck be a packinghouse supply when moving to a tent or awning manufacturer. In order for sawdust or cotton duck to be a packinghouse or dairy material or supply, they must be carmarked or intended at the time for use in a packinghouse or dairy. Thus, almost without exception packinghouse supplies, et cetera, would move only to or from packinghouses or to or from dealers in packinghouse supplies, et cetera, and any movement of a commodity which might be a packinghouse commodity, to or from any other type of shipper would normally appear to be outside petitioner's authority in the absence of special or unusual circumstances.

As the court's opinion notes, appellant has persistently resisted this construction. Thus, in 1950, an official of the Bureau of Motor Carriers advised appellant by letter that it was exceeding its authority. The letter set forth several types of shipments which, viewed in the light of the character of the shipper, could not be deemed within the scope of the permit, a permit which had been designed to limit the carrier to serving particular types of industrial users. The shipments which the Bureau stated to be unauthorized were:

(1) Shipments of tin plate from Gary, Indiana, to the American Can Company (a manufacturer of cans) in St. Paul, Minnesota.

(2) Shipments of boxes, cartons, etc., for Waldorf Paper Products Company.

(3) Shipments of canned and bottled beer for the Hamm Brewing Company.

(4) Shipments of glass bottles for the Toni Company.

(5) Shipments of cleanser for the Royal Lemon Company in Minneapolis.

(6) Shipments of frozen eggs in cans.

(7) Shipments of cases or cartons from Flour City Box Company to Pepsi Cola Bottling Company.

Appellant's counsel advised the Bureau that it would continue to assert the right to make such shipments "when and until it is prevented from doing so by legal action."

Thereupon, the Commission, by order of August 4, 1950, instituted an investigation into appellant's operations. The order charged appellant with transporting

> various commodities not within the scope of the commodity description * * *; including beer, in cans, in bottles, and in kegs; empty glass bottles for use in distributing soft drinks, beer, hair waving solutions; and shampoos; tin plate and sheet metal to a can manufacturer for use in manufacturing cans; paper containers and other paper products for use by manufacturers of or dealers in electric batteries, paints, beer, dry cleaning supplies, flour, soap, and petroleum products; and paper garment hangers.

The stated purpose of the investigation was to determine whether appellant was exceeding its permit and, if so, to take corrective action.

A hearing was held in November 1950 before a duly qualified examiner, who found that appellant had been exceeding its authority. In accordance with usual practice, the parties were afforded full opportunity to file briefs and exceptions to the examiner's proposed report. On May 26, 1952, Division 5 of the Commission issued its report and order. Its ultimate findings and conclusions were summarized in the opinion of the district court as follows:

> (1) that shipments of tin plate, solder, and wire can keys delivered to a can manufacturer were not within the coverage of Dart's permit, even though the manufacturer used the materials for the making of cans for packing houses or canneries; (2) that shipments of shelled Spanish peanuts (which Dart's records showed it had transported, but which its president denied that it had transported) were unauthorized; (3) that the transportation of beer in cans, bottles, and kegs was not within the scope of Dart's authority, since the term "canned goods" as used by the Commission did not include canned beer or other materials which merely for convenient packaging were put in cans, and since carriers serving breweries were customarily authorized to transport "malt beverages," while those serving canneries were authorized to transport "canned goods"; (4) that Dart had exceeded its authority in transporting certain glass bottles and jars for uses foreign to packing houses, dairies or canneries; (5) that frozen foods were not "canned goods" within the meaning of Dart's permit; (6) that loose meats

> and packing-house products shipped from a meat packer in Faribault, Minnesota, to itself in Chicago were not within the scope of Dart's permit; (7) that Dart exceeded its authority in transporting paper containers, paper products, cleanser, wooden boxes, and glass trays to or for persons not engaged in the packing house, dairy products, or canning business, it appearing that such commodities were not products of or intended for use in a packing house, dairy or canner, and that, in order for Dart to stay within the scope of its authority, "such commodities must at the time of shipment definitely be intended for use by a packing house, dairy-products concern, or cannery."

The order issued by the Commission directs appellant to cease and desist from all operations of the character found in the report to be unlawful. A petition for rehearing was denied on September 18, 1952.

In its complaint filed in the district court, appellant urged that the Commission had improperly construed its permit and that the administrative proceeding had been characterized by various procedural errors. The district court concluded, upon an examination of the record, that the Commission's factual findings concerning the operations attributed to appellant were fully supported by substantial evidence. It held that the Commission's construction of the language of the permit was entitled to great weight and that its construction was in no respect arbitrary. As to the Commission's conclusion that certain of

the described activities were in excess of authority, the court held that the Commission was "clearly right"; as to the other activities, the court concluded that the Commission's construction of the permit was not unreasonable. The court also considered and discussed each of the procedural errors charged and found them to be without substance.

1. The substantive issues in the case involve the meaning of particular commodity descriptions used in a particular carrier's permit. There is no question raised as to the well-established authority of the Commission to specify the type of service to be rendered by an authorized motor carrier and to adopt an appropriate method of classification. See Sections 204 (b), 208; *Crescent Express Lines* v. *United States*, 320 U. S. 401, 408. And there can be no doubt, we believe, that the Commission's construction of language used in an instrument of authorization issued by the Commission is controlling, unless it be clearly unreasonable. *United Truck Lines* v. *Interstate Commerce Commission*, 189 F. (2d) 816, 817 (C. A. 9), certiorari denied, 342 U. S. 830; *Adirondack Transit Lines* v. *United States*, 59 F. Supp. 503, 504 (S. D. N. Y.), affirmed, 324 U. S. 824; *Malone Freight Lines, Inc.* v. *United States*, 107 F. Supp. 946 (N. D. Ala.), affirmed 344 U. S. 925.

The primary source of dispute between the Commission and appellant has been the Commission's view that appellant's authority to carry particular shipments of commodities must be determined on the basis of whether such shipments are intended for use

by a packing house, dairy-products concern, or cannery. It is a common practice of the Commission as reflected in numerous certificates and permits which have heretofore been examined by this Court, to define carrier authority in terms of the function or use to which the transported materials are to be put. Certainly, there is nothing inherently unreasonable in such a system of classification. "An accurate definition frequently can be made only in terms of the type or class of shippers to be served." *Noble* v. *United States*, 319 U. S. 88, 91–2.[1]

As noted above, the district court has found that the Commission's construction of appellant's certificate, as applied to the various described activities found unauthorized, is free from arbitrariness. Without further elaboration of the particulars, which are fully explained in the court's opinion, we respectfully submit that this conclusion is a sound one, and that this case presents no substantial issue of general importance which would warrant further appellate review.

2. Various procedural errors are urged by appellant. Thus, it is argued that there was inadequate notice because the order which instituted the Commission's proceeding did not specify each of the

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[1] A different type of question was presented in connection with the Commission's conclusion, challenged by appellant, that the carriage of beer in cans was not authorized. This was based upon a determination that the term "canned goods" is a term of art relating to products of the canning industry and not to products of the brewing industry. See 54 M. C. C. at 434–5.

commodities whose carriage was ultimately determined, as a result of the investigation, to be unauthorized.[2] The district court found that, in the circumstances, there was no showing of prejudice because of the failure to provide a "complete and precise bill of particulars." Nor is there any such showing in the appeal papers. It is to be noted, in this connection, that the differences between the Commission and the appellant were of long standing and their nature was well known to each. Moreover, at no point during the hearing did appellant seek a continuance or adjournment so that it might adduce further evidence. The court properly concluded that appellant "was already aware of the issues to be tried." [3]

It is also claimed that appellant was unduly restricted in its efforts to cross-examine the Bureau of Motor Carrier agent who appeared as a witness for the Commission. Such restrictions as there were, it is apparent from a reading of the transcript, were imposed in connection with questioning of the agent designed to elicit his views on the meaning of language in the permit. The purpose of the examiner in limit-

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[2] As noted above, the order charged the transportation of "various commodities not within the scope of the commodity description * * * including etc."

[3] In its assignment of error no. 4, appellant asserts that it made a "timely demand" for further particularization. As indicated in its statement as to jurisdiction, however, the demand was not made until the day of the hearing, more than three months after the issuance of the order instituting the investigation.

ing this line of questioning was to avoid purely repetitious and argumentative matters which did not go to any issue of fact.[4]

The suggestion is also made that the Commission did not adequately sustain the burden of proof. A representative ruling on the subject, which appellant has criticized, relates to the shipment of empty paper containers from a manufacturer to the Carr Consolidated Biscuit Company. Appellant's own records, examined by the Commission's agent, showed the movements in question. It was, of course, clear on the face of the matter that carriage of containers to a biscuit company would not ordinarily

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[4] A typical extract appears at Tr. 78–79.

"By Mr. Loevinger:

"Q. What, in your opinion, is the proper definition of the word 'materials' as used in the permit?

"A. I have already answered it—the contents of the cans of the carrots and peas, raw materials that go into the cans.

"Q. Can you give us a broader definition of materials for use not only with reference to a canning factory or packing house?

"Mr. Bode. Objection.

"Exam. Walsh. Objection sustained.

"Mr. Bode. Objected to as repetitious and argumentative. We've got to limit this somewhere.

"Exam. Walsh. All right.

By Mr. Loevinger:

"Q. Does it differ, Mr. Ganley, between the denotative and connotative meaning?

"Mr. Bode. Same objection.

"Exam. Walsh. Objection sustained."

come within the scope of appellant's authority which authorizes it to make shipments to packing houses, dairies, and canneries. Appellant stresses, however, in its statement as to jurisdiction, that the Commission's witness testified as follows:

> Mr. LOEVINGER:
>
> Q. You don't know what the Carr Consolidated Biscuit Company does, do you?
>
> A. Other than a biscuit is a biscuit.
>
> Q. You don't know anything more about them than their name, do you?
>
> A. I do not.

We submit that it was not unreasonable to presume that the business of a biscuit company relates to biscuits.[5] Certainly, the presumption was strong enough to shift to appellant the burden of rebutting it.

The alleged procedural errors are lacking in substance. They have been examined by the district court, which stated, "We find nothing in the record which indicates to us that the hearing accorded Dart was not a full and fair hearing."

It is believed that the decision of the district court was clearly correct and that there are no questions

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[5] In *Directory of U. S. Companies*, Economic Cooperation Administration, Office of Small Business (1950), Sec. II–75, the business of the Carr Consolidated Biscuit Company is described as "Biscuits, Crackers, Cookies."

of substantial or general importance presented by the appeal. The judgment should be affirmed.

Respectfully submitted.

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No. 800. Dart Transit Co. *v.* Interstate Commerce Commission et al. Appeal from the United States District Court for the District of Minnesota. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. Mr. Justice Black and Mr. Justice Douglas are of the opinion probable jurisdiction should be noted and the case set down for oral argument. *Lee Lavinger* and *David W. Louisell* for appellant. *Acting Solicitor General Stern* and *Edward M. Reidy* for the United States and the Interstate Commerce Commission, appellees. Reported below: 110 F. Supp. 876.